

Rounding the Last Bend in Special Education - Guardianship or an Alternative?

Disability *Rights*
South Dakota

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Guardianship And Conservatorship

- People with disabilities have historically been perceived as being unable to make choices. They have frequently been denied the opportunity to make choices. At best, they have been perceived as needing varying amounts of assistance to make appropriate choices about themselves. This restriction has been done by social and legal conventions that societies developed and nurtured over the centuries. In western cultures, the circumstances and fairness of taking away a person's ability to make meaningful decisions and the process used to invade that right and direct another's life is the focus and purpose of the guardianship process.

Guardianship/Conservatorship in South Dakota

- ▶ Guardianship is a State law process. There are no federal statutes directing the conduct of guardianship. South Dakota's statutes are currently found in Chapter 29-5 of South Dakota Codified Laws (SDCL).
- ▶ SD Guardianship laws underwent many changes and revisions by the legislature over of the years.
- ▶ This led to a lack of uniformity and confusion. After a summer study in the late 1980s, the law was rewritten in 1993.

1993 Guardianship Revisions

- ▶ A clear distinction between care of the person and management of property.
- ▶ Elimination of pejorative terminology.
- ▶ Encouragement of alternatives to guardianship/conservatorship.
- ▶ Authorization of “limited” and “temporary” guardians and conservators.

1993 Guardianship Revisions (cont)

- ▶ Encourages participation of the protected person in decision-making.
- ▶ Requirement of more complete information before a guardianship decision is made.
- ▶ Protection of rights of the person alleged to need protection.
- ▶ Requirement of annual status reports.

Definitions – SDCL 29A-5-102

- ▶ **Protected Person** - any individual for whom a guardian or conservator has been appointed other than for reasons of minority.
- ▶ **Guardian** - one appointed by the court to be responsible for the personal affairs of a minor or protected person, but does not include one who is only a guardian ad litem.
- ▶ **Conservator** - one appointed by the court to be responsible for managing the estate and financial affairs of a minor or protected person.

Definitions (cont.) – SDCL 29A-5-102

- ▶ **Limited Guardian** - one appointed by the court who has only those responsibilities for the personal affairs of a minor or protected person as stated in the order of appointment.
- ▶ **Limited Conservator**- one appointed by the court who has only those responsibilities for managing the estate and financial affairs of a minor or protected person as stated in the order of appointment.
- ▶ **Temporary guardian/conservator** - six months for a minor, 90 days with one extension for adults. (SDCL 29A-5-210 and 315)

Definitions (cont.) – SDCL 29A-5-502

- ▶ **Joint guardians/conservators** - additional persons appointed at the time the court orders the guardianship/conservatorship. (SDCL 29A-5-502)
- ▶ **Successor guardians/conservators** - appointed either before or at the time of a vacancy. One appointed before a vacancy is empowered to immediately assume duties of the predecessor. He/she shall succeed to the powers and duties of the predecessor unless otherwise ordered by the court. (SDCL 29A-5-502)

Who May Become Guardian/Conservator?

- ▶ Any of the following may petition for guardianship or conservatorship if they are capable of providing an active and suitable program and **are not providing substantial direct care services or financial assistance to the minor or protected person** other than the services connected with the office being held:
 - ▶ An adult individual;
 - ▶ A public agency or nonprofit corporation;
 - ▶ The Dept. of Human Services, only if there is no individual, nonprofit corporation, or public agency to become guardian or a bank or trust company to become conservator.
 - ▶ A bank or trust company authorized to exercise trust powers or engage in trust business in SD may become a conservator.
 - ▶ No individual or entity whose interest is that of creditor may be appointed guardian/conservator. (SDCL 29A-5-110)

Procedures for appointment – Adult

- ▶ Per SDCL 29A-5-300, the procedures include:
- ▶ 1) filing petition, including evaluation report,
- ▶ 2) Judge setting a hearing date within 60 days of filing the petition,
- ▶ 3) giving notice of hearing to person alleged to need protection and others,
- ▶ 4) filing statement of financial resources of person alleged to need protection,
- ▶ 5) appointing attorney or court representative by court if requested, and
- ▶ 6) holding hearing to determine whether: the person meets the criteria; a guardian/conservator will be appointed and type; the proposed guardian/conservator is eligible for appointment; and a bond will be required,
- ▶ 7) entry of order of appointment and filing of acceptance,
- ▶ 8) issuance of letters of office to guardian or conservator with specifics if limited,
- ▶ 9) mailing appointment with statement of termination of rights to the protected person and those receiving notice of hearing, and
- ▶ 10) if applicable, filing of non-resident guardian or conservator naming resident agent.

Evaluation Report – SDCL 29A-5-306

- ▶ An evaluation report on the condition of the person alleged in need of protection must be filed with the petition or as directed by the court unless the petition was brought on the basis the person is an absentee.
- ▶ The purpose of the evaluation is to have sufficient information submitted to the court to determine whether the person needs a guardianship or conservatorship.
- ▶ **The evaluation report provides to the court an idea of whether the provision of additional services would avoid the necessity of an appointment.**
- ▶ It assists in helping the guardian or conservator to begin planning for the needs of the person by reviewing aspects of the person's life including medications.
- ▶ It helps the court determine whether the person will be able to attend the hearing. The following information must be provided in the evaluation report:

Evaluation Report (cont.)

- ▶ Nature, type and extent of the person's incapacity and cognitive and functional limitations. It evaluates mental and physical condition, adaptive behavior and social skills.
- ▶ Services person is receiving for health care, safety, habilitation, and therapeutic needs, or (for conservatorship) for the management of the person's estate and financial affairs.
- ▶ Opinion if guardian/conservator needed and type/scope.
- ▶ Opinion why attending hearing would be detrimental to person if petition states person not able to attend due to incapacity.
- ▶ If the person is on medications that may affect the person's attendance at the hearing.
- ▶ Information on evaluator, date completed; if done over 3 months prior to filing the petition, statement of no material change in person's condition.

What to tell parents

- ▶ Guardianship/Conservatorship is a legal proceeding and they will need an attorney to assist them in this process.
- ▶ There are costs involved and they should expect to spend \$600.00 or more.
- ▶ The person who will become the protected person has a right to disagree with the procedure and with who will be the guardian/conservator.

Responsibilities of Guardian/Conservator

- ▶ To be active and knowledgeable of the protected person.
- ▶ To maintain sufficient contact with protected person to know person's capabilities, limitations, needs, and opportunities.
- ▶ To make decisions regarding the protected person's support, care, health, habilitation, therapeutic treatment, and if not inconsistent with another order, determine residence.
- ▶ To be guided in his/her activities only by the limitations of the protected person.* (*also deemed right of protected person)
- ▶ To encourage, if feasible, the protected person to participate in decision-making, act on his/her own behalf, and develop or regain capacity to manage personal affairs.*
- ▶ To consider the expressed desires of the protected person.*
- ▶ To always act in the protected person's best interests. *

Responsibilities of Guardian/Conservator (cont)

- ▶ Conservator has the same responsibilities as the guardian with respect to involving the protected person in decision-making to the greatest extent possible and taking into consideration the expressed desires and personal values and act in the person's best interests. The conservator is also to handle the fiduciary aspects of the person.
- ▶ The conservator is to apply the income and principal of the estate as needed for the protected person's support, care, health, and if applicable, habilitation or therapeutic needs.
- ▶ The conservator is also empowered to provide support to any legal dependants of the person who are unable to support themselves and are in need of support.

The Protected Person's Rights – SDCL 29A-5-118

- ▶ Appointment of Guardian/Conservator does not constitute a general finding of incompetence unless the court orders.
- ▶ Protected Person may vote unless right is removed by court.
- ▶ The protected person retains all rights that have not been granted to the guardian/conservator.
- ▶ Without prior court authorization, the guardian cannot:
 - ▶ Change the residence of a minor or protected person to another State.
 - ▶ Terminate or consent to termination of a minor's or protected person's parental rights.
 - ▶ Initiate a change in the minor's or protected person's marital status.
 - ▶ Revoke or amend a durable power of attorney of which the protected person is the principal.

Modification, Termination, Resignation and renewal (SDCL 29A-5-501)

- Guardian's/conservator's authority may cease upon death of protected person, reaching age of majority (for minor), transfer of jurisdiction to another State, or by court action (modification, termination, resignation).
- Court may modify guardianship upon petition by protected person, guardian, interested party, or court's own motion.
- Court may modify type of appointment, and areas of protection, management, or assistance granted to limited guardian.
- ***Note: Limited guardianship is a lesser restrictive alternative to full guardianship.

Modification, Termination, Resignation and renewal (SDCL 29A-5-501) (cont)

- ▶ Termination may be ordered if:
 - ▶ Protected person is no longer in need of assistance or protection of guardian/conservator;
 - ▶ The extent of protection, management, or assistance previously granted is found excessive or insufficient when considering current needs;
 - ▶ Protected person's understanding or capacity to manage estate and financial affairs or provide for health, care, and safety has changed; or
 - ▶ No suitable guardian/conservator can be secured.
- ▶ Court may appoint attorney, a court representative, and order evaluation. Protected person has same rights at modification hearing as at initial petition hearing.

Modification, Termination, Resignation and renewal (SDCL 29A-5-501) (cont)

- ▶ Guardian may petition to resign. Absent good cause, court may not allow resignation without a willing successor available.
- ▶ Guardian may be removed upon petition if he/she:
 - ▶ Avoids service of process or notice;
 - ▶ Guardianship secured by material misrepresentation;
 - ▶ Has incapacity or illness affecting fitness;
 - ▶ Is convicted of crime reflecting on fitness;
 - ▶ Wastes or mismanages estate, abuses powers, or fails to discharge duties; or neglects care and custody of minor or protected person or dependents;
 - ▶ Conflict of interest;
 - ▶ Fails to file reports/accountings or comply with order.

Establishment Program

Dept. of Human Services

- ▶ This Establishment Program assists adults with developmental disabilities and their families or friends to pay legal costs up to \$500 associated with establishing a guardianship and/or conservatorship appointment.
- ▶ **Minimum Criteria for Application**
- ▶ *The individual MUST:*
- ▶ Be at least 18 years of age or older.
- ▶ Be a resident of South Dakota.
- ▶ Have a documented developmental disability as defined in SDCL 27B-1-18.
- ▶ Be receiving a first time appointment of a guardian and/or conservator.

Establishment Program

- ▶ **Application Process**
- ▶ Submit a completed [application](#).
- ▶ Submit a copy of the most current psychological or psycho-educational evaluation.
- ▶ Submit a copy of the ICAP summary if one has been completed.
- ▶ Submit the application no more than three months prior to the individual's 18th birthday.
- ▶ The application must be received by the Department of Human Services prior to the hearing for appointment of guardianship or conservatorship to be considered.
- ▶ <https://dhs.sd.gov/guardianship/establishmentprogram.aspx>
- ▶ DHS website

Guardianship and Conservatorship Services

- ▶ DHS can serve as guardian/conservator ONLY IF no individual, nonprofit corporation, bank or trust company, or other public agency can serve. SDCL 29A-5-110.
- ▶ <https://dhs.sd.gov/guardianship/guardianshipandconservatorshipservices.aspx>
- ▶ Credit: Dept. of Human Services

Supported Decision Making as an Alternative to Guardianship

- ▶ It is NOT a “one-size fits all” option.
- ▶ Many people use SDM making every day when they ask a friend, relative, supervisor, or spouse for advice.
- ▶ A popular game show, “Who Wants to Be a Millionaire,” allows SDM when the contestant decides to “phone a friend” for the answer to a tough question.
- ▶ SDM may be less restrictive than a guardianship attorney

What Is Supported Decision Making? Supportmydecision.org

- ▶ Developing decision-making skills by relying on supporters to assist in collecting information, processing information, and coming to a decision.
- ▶ SDM is an alternative to guardianship providing a trusted environment for individuals who are seeking assistance with decision-making while promoting self-determination.
- ▶ In contrast to guardianship, SDM is flexible and can change with the needs of the individual to provide opportunities for independence and autonomy.

SDM

- ▶ SDM can be formal with written agreements or
- ▶ SDM can be informal with an understanding that a person with a disability can ask a trusted friend for advice.
- ▶ It is growing world-wide as an alternative to guardianship for individuals with disabilities.

SDM

- ▶ Individuals, organizations, and countries recognize that too often disability is assumed rather than ability being presumed.
- ▶ The United Nations adopted the Convention on the Rights of Persons with Disabilities on December 13, 2006.
- ▶ It became effective on May 3, 2008, after twenty countries ratified it.
- ▶ This agreement hopes to ensure that all individuals with disabilities are treated the same as people without disabilities.

Sources of Information

- ▶ www.JennyHatchJusticeProject.org,
- ▶ https://www.americanbar.org/publications/bifocal/vol_37/issue_2_december2015/2015-guardianship-supported-decision-making.html,
- ▶ www.SupportedDecisionMaking.org,
- ▶ www.BBI.Syr.edu,
- ▶ www.DCQualityTrust.org, and
<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>
or
- ▶ [United Nations Convention on Rights of Persons with Disabilities \(CRPD\)](#)

Alternatives to Guardianship

- ▶ Representative payees or substitute payees.
- ▶ Case/care management.
- ▶ Health care surrogacy.
- ▶ Trusts.
- ▶ Durable powers of attorney for health care or property.
- ▶ Living wills.
- ▶ Community advocacy systems.
- ▶ Joint checking accounts.
- ▶ Release of information to speak to medical professional

Source: National Guardianship Association

Formal Supports

- ▶ Formal SDM supports may require an attorney to help draft them.
- ▶ These include a power of attorney for education or health care,
- ▶ Durable power of attorney for health care,
- ▶ Living will, or a trust.
- ▶ For a Special Needs Trust or Hamilton Trust - see an attorney specializing in trusts

Power of Attorney

- ▶ Power of attorney addressed a business need
- ▶ Developed within the concept called “agency”
- ▶ Agency allows one to speak for another
 - ▶ Person has to be adult, capacity to contract
- ▶ Person creating authority, “principal”
- ▶ Person acting “agent”, “attorney-in-fact - AIF”
- ▶ Oral/written, anything legal i.e., selling property
- ▶ In effect until:
 - ▶ Expiration, revocation by principal, death of principal
 - ▶ Incapacity of principal to contract

Power of Attorney (cont)

- ▶ In 1977 legislature created second “type” of POA
- ▶ Allowed Power of Attorney to:
 - ▶ Survive incapacity of principal
 - ▶ Begin at time of principal’s incapacity
 - ▶ Called “durable” and “springing”
- ▶ Must be in writing, suggested language in law
 - ▶ “This power of attorney shall not be affected.....”
 - ▶ “This power of attorney shall become effective....”
- ▶ 1977 changes also allowed a principal to nominate guardian

Power of Attorney (cont)

- ▶ Scope of authority expanded in 1990
- ▶ Health care decisions, custodial care added
- ▶ Consent to reject or withdraw consent to:
 - ▶ Food and hydration
- ▶ AIF can execute release for access records
- ▶ Directives must follow guidelines:
 - ▶ Accepted medical standards, recommendations
 - ▶ Expressed decisions, comfort care cannot be withheld
 - ▶ Be in the best interests of the principal
- ▶ Physician/provider free from liability

Power of Attorney (cont)

- ▶ 2004 Laws further refined/defined authority
- ▶ Principal's signature presumed to be valid
- ▶ Person may rely on presumed validity
- ▶ Acts done by AIF have same effect as principal
- ▶ Person who refuses to accept liable for damages
- ▶ Person not liable if:
 - ▶ Had knowledge of revocation, death, contrary wish
 - ▶ POA term expired, reasonable belief POA not valid

Power of Attorney (cont)

- ▶ 2012 Laws again refined/defined authority
- ▶ Addressed questions regarding mental health
- ▶ Expanded scope of POA authority to include:
 - ▶ “health care, including any care, service, or procedure to maintain, diagnose, or treat a person’s physical or mental condition”

Health Care Consent

- ▶ Response to 1980's personal right to die debate
- ▶ 1990 legislative responded to clarify issue
- ▶ Covers immediate health care needs of adult
- ▶ Sets out specific person/s to make decisions
- ▶ Considers when person w/authority is not available to make decisions
- ▶ Sets out when the authority can be used:
 - ▶ Person incapable of giving informed consent, i.e.,
 - ▶ Guardian appointed, adjudged, attending physician

Health Care Consent (cont)

- ▶ Health care decision can be made by:
 - ▶ Spouse, if not legally separated
 - ▶ Adult child, parent, adult sibling
 - ▶ Grandparent, adult grandchild
 - ▶ Adult aunt/uncle or adult niece/nephew
 - ▶ Close friend, if:
 - ▶ Adult who has provided significant care
 - ▶ Exhibited concern, maintained regular contact
 - ▶ Familiar with activities, health, religious beliefs
 - ▶ See SDCL 34-12C-3

Health Care Consent (cont)

- ▶ Person may disqualify by writing or noted in file
- ▶ Person with authority to act to be guided by:
 - ▶ Principal's expressed wishes, good faith
- ▶ Court may determine who has authority
- ▶ Statute does not permit:
 - ▶ Unlawful medical treatment
 - ▶ Change in standard of care
 - ▶ Overriding treatment at HSC, Developmental Center

Sources of Information

- ▶ Power of Attorney - SDCL 59-2
- ▶ Health Care Consent - SDCL 34-12C
- ▶ Living Wills - SDCL 34-12D
- ▶ Advance Directives SDCL 27A-16
- ▶ Guardianship/Conservatorship SDCL 29A-5
- ▶ Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act - SDCL 29A-5A
- ▶ Ask the school's attorney or suggest that parents/student contact an attorney